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No. 91-499

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In the Supreme Court of the United States

OCTOBER TERM, 1991

MONA HANESWORTH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner and her husband filed a joint federal income tax return for 1978.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 38-54) is unpublished, but the decision is noted at 936 F.2d 583 (Table). The opinions of the district court (Pet. App. 55-63) and of the bankruptcy court (Pet. App. 64-73) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 26, 1991. The petition for a writ of certiorari was filed on September 23, 1991, and was served upon the United States on October 4, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner and Alan Hanesworth were married in 1956, separated in 1977, and divorced in 1984. Until 1980, they regularly made joint federal income tax returns, including those for 1977 and 1979, which were filed while they lived apart (Pet. App. 40-41, 53, 57, 61, 67).[1] During 1978, petitioner earned no income of her own, relying on her husband for support (*id.* at 40-41, 57). A joint income tax return for 1978 was signed and filed by Mr. Hanesworth, reporting a tax liability of $29,480. Although petitioner did not sign the return, it was otherwise in the form of a joint return. The names and social security numbers of both spouses appeared at the top, exemptions were claimed for each of them and their children, and the appropriate box was checked to indicate "married filing jointly" (*id.* at 43-44, 57).

The Internal Revenue Service (IRS) accepted the 1978 return as a valid joint return and assessed the tax of $29,480 as a joint and several obligation of the spouses.[2] While this tax remained unpaid, petitioner signed waivers to extend the collections period in 1985 and again in 1986. She was thus aware, and did not then contest, that the IRS held her jointly responsible for the tax (Pet. App. 44, 57-58). In 1988,

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[1] Unless a decree of divorce or of separate maintenance has been entered, a husband and wife need not be living together to file a joint return. See 26 U.S.C. 6013(a) and (d)(2). The mere fact that the Hanesworths separated in 1977 did not preclude them from filing a joint return for that or other years.

[2] Joint and several liability is a price that the tax law generally exacts in return for the lower rates and other tax advantages granted to a married couple who aggregate their income and deductions on a joint return. See *Sonnenborn* v. *Commissioner*, 57 T.C. 373, 380-381 (1981).

the IRS levied upon her home in an effort to collect the still unpaid assessment. Petitioner then filed for bankruptcy (*id.* at 58, 69) and moved the bankruptcy court for relief from the tax liability. Petitioner contended that the tax arose from income earned by her husband and that she had not consented to the filing of a joint return for 1978.[3]

2. During an evidentiary hearing before the bankruptcy court, petitioner acknowledged that she and her husband had a consistent pattern of making joint income tax returns, including the returns filed for 1977 and 1979, the years before and after the one directly in question (Pet. App. 47, 61, 67). Petitioner also did not dispute that she would have signed the joint return for 1978 had she been requested to do so. Petitioner conceded that she left the management of the family's economic matters to her husband; that she would customarily sign whatever he asked her to sign; and that she believed, at the time, that she had to file a joint return for 1978 because her husband was then her sole support (*id.* at 47, 60-61, 68).

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[3] In bankruptcy court, petitioner initially claimed that she filed a joint return for 1978 but should be exonerated as an "innocent spouse" (26 U.S.C. 6013(e)). That provision protects from joint liability a spouse who files a joint return without knowing, or having reason to know, that the return has substantially understated the couple's tax liability, and who meets certain other requirements. That provision was clearly not applicable to petitioner because the 1978 return made no substantial understatement of the actual tax liability. She therefore withdrew the innocent spouse defense, and, in 1989, for the first time disavowed the joint status of the 1978 return, which had been filed ten years before (Pet. App. 44-46, 71).

The bankruptcy court rejected petitioner's claim for relief from the tax assessment, finding that "the evidence is clear that she did intend to file a joint return" for 1978, with the result that "the joint return is valid even though not signed by both spouses" (Pet. App. 68, 71). The district court affirmed (Pet. App. 55-63). The court upheld the finding of the bankruptcy court that petitioner consented to the filing of the joint return for 1978. The district court explained that her practice of submitting joint returns with her husband, her long delay in repudiating the 1978 return, and her testimony that she habitually left financial matters to him, signing whatever documents he proposed, all supported the inference that the 1978 return was filed with her approval (*id.* at 59-63).

3. The court of appeals also affirmed, agreeing with the courts below that petitioner intended to file a joint return for 1978 (Pet. App. 38-54). Given petitioner's "failure to object to her liability until she realized her home was actually in jeopardy, the established pattern of joint filing both before and after the year in question, and [her] history of acquiescence in her husband's handling of the family's financial affairs," the court of appeals concluded that the bankruptcy court's finding that petitioner had tacitly consented to the joint return was not clearly erroneous (*id.* at 53).

ARGUMENT

The decision of the court of appeals is correct and rests upon findings of fact now concurred in by three courts. The decision below does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

1. Although a joint return ordinarily must be signed by both spouses (see Treas. Reg. § 1.6013-1 (a)(2)), it is established that a return may be treated as joint even though a husband or wife fails to sign it. *E.g.*, *Kann* v. *Commissioner*, 210 F.2d 247, 251 (3d Cir. 1953) (regulations "are not mandatory but merely set forth a method of compliance and may be waived by the Commissioner"), cert. denied, 347 U.S. 967 (1954); *Estate of Upshaw* v. *Commissioner*, 416 F.2d 737, 742-743 (7th Cir. 1969) ("if [spouse] intended to file a joint return, it may be found to be such even though she did not sign it or expressly authorize it to be signed for her"), cert. denied, 397 U.S. 962 (1970). Whether a return that a spouse has failed to sign is effective as a joint return presents questions of fact concerning the intent and practices of the parties. See, *e.g.*, *Federbush* v. *Commissioner*, 325 F.2d 1, 2 (2d Cir. 1963); *Sharwell* v. *Commissioner*, 419 F.2d 1057, 1059 (6th Cir. 1969). Although various factors bear on these issues, consent to a joint return is often inferred when a married couple has followed a consistent pattern of making joint returns, with the nonsigning spouse relying on the other to prepare and submit them. See *O'Connor* v. *Commissioner*, 412 F.2d 304, 309 (2d Cir. 1969) ("it may be inferred that [wife] intended to have [husband] file for her whatever statement of income was legally

required"), cert. denied, 397 U.S. 921 (1970); *Campbell* v. *Commissioner*, 56 T.C. 1, 12-14 (1971). See generally 4 B. Bittker, *Federal Taxation of Income, Estates and Gifts* ¶ 111.3.2, at 111-37 (1981).

The decision in this case is fully consistent with those principles. The bankruptcy court found that petitioner and her husband filed joint returns for years before and after 1978; that she entrusted the family's business affairs to him; and that she thought, at the time, that she was required to file a joint return for 1978 (Pet. App. 67-68). This evidence led the court to find that "she did intend to file a joint return" for 1978 (*id.* at 68). The district court examined the record and sustained that finding of fact (*id.* at 55-63), as did the court of appeals (*id.* at 38-54). There is no reason for further review of the concurrent factual findings of these three lower courts. See, *e.g.*, *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 317-318 n.5 (1985); *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635-636 (1967).

2. Petitioner errs in contending (Pet. 25, 27-29) that the decision in this case conflicts with *Shea* v. *Commissioner*, 780 F.2d 561 (6th Cir. 1986), *Bauer* v. *Foley*, 404 F.2d 1215, 1220 (2d Cir. 1968), on reh'g, 408 F.2d 1331 (2d Cir. 1969), and *O'Connor* v. *Commissioner*, *supra*. The court of appeals correctly distinguished *Shea* on its facts (Pet. App. 48-49) because, in *Shea*, the return was signed by neither spouse, but only by a return preparer who lacked authority to bind the wife. See 780 F.2d at 567-568. *Foley* is also inapposite because it involved the entirely different situation where a spouse claimed that her signature on tax returns had been forged or af-

fixed under duress and against her will. See 408 F.2d at 1332-1334. Nor does *O'Connor* conflict with the decision below, for in *O'Connor* the Second Circuit "affirmed as not clearly erroneous" a finding that a spouse implicitly ratified joint returns signed only by her husband. See 412 F.2d at 310.[4]

Equally without merit is petitioner's argument that the judgment below sustains a "naked" assessment lacking an adequate evidentiary foundation (Pet. 30, citing *United States* v. *Janis*, 428 U.S. 433, 441 (1976)). The underlying assessment in this case, in sharp contrast to *Janis*, was of income tax reported to be due on the return. The IRS assessed that tax as a joint and several liability of petitioner and her husband, based on a tax return bearing both their names and marked "married filing jointly" (Pet. App. 43). Such an assessment based upon a filed return obviously has nothing in common with the assessment in *Janis*, where the Commissioner lacked an evidentiary basis for determining and assessing taxes due on gambling activities.

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[4] The court of appeals agreed with the holding in *O'Connor* (412 F.2d at 309) that the Commissioner has the burden of showing that a nonsigning spouse has consented to a joint return (Pet. App. 43). Petitioner's assertion that there is a conflict on this issue (Pet. 33) is thus in error. The court of appeals concluded that the government had met its burden in this case for, "[a]lthough the bulk of the evidence is circumstantial, it weighs heavily on the side of the government" (Pet. App. 53).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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